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Utah Supreme Court

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IN THE
Supreme Court

OF THE
State of Utah

FILED

JUL - 6 1950

UINTAH FREIGHT LINES and
EASTERN UTAH TRANSPORTATION COMPANY,

Plaintiffs,

vs.

PUBLIC SERVICE COMMISSION
OF UTAH and ASHTON'S, INCORPORATED,

Defendants.

Clerk, Supreme Court, Utah

Case
No. 7429

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BRIEF OF PLAINTIFF

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IN THE
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State of Utah

UINTAH FREIGHT LINES and
EASTERN UTAH TRANSPORTATION COMPANY,

Plaintiffs,

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PUBLIC SERVICE COMMISSION
OF UTAH and ASHTON'S, INCORPORATED,

Defendants.

Case
No. 7429

BRIEF OF PLAINTIFFS

STATEMENT OF FACTS

The plaintiffs obtained a writ of certiorari from this Court (Tr. 119) to review the action of the Public Ser-

vice Commission of Utah, hereinafter referred to as the Commission, in granting a contract motor carrier permit over the objections of plaintiffs and others.

The defendant Ashton's, Inc., a Utah corporation with its principal place of business at Heber City, Utah, made application to the Commission for a permit to operate as a contract motor carrier of property in intra-state commerce from Salt Lake City, Heber City, and Devil's Slide on one hand to Roosevelt and Vernal on the other, for Ashton Bros., Inc., and Ashton Oil & Gas Company at Vernal and for Leslie Ashton & Sons Company at Roosevelt. The contracts were filed (Tr. 5, 6, 7). The permit was granted by the Commission July 20, 1949 (Tr. 101-110). Petition for rehearing was filed August 9, 1949 (Tr. 112), and denied November 16, 1949 (Tr. 117).

The background of Ashton's operation in the Uintah Basin is as follows: Leslie Ashton, prior to 1917, was engaged in a mercantile business at Vernal, Utah, and also hauled freight by team and wagon from Price, Utah. Leslie Ashton died in 1930 leaving three sons, Lowe, Clarence, and Rae. In 1915, Leslie Ashton formed the Ashton Bros. Company in Vernal, Utah, and in 1923 formed the Leslie Ashton & Sons Company in Roosevelt. In 1927 the Ashton Oil & Gas Company was formed for the purpose of operating service stations. Also, in 1927, the three sons formed a partnership known as Ashtons and commenced a general mercantile business at Heber, Utah (Tr. 272).

During 1945 and the first part of 1946, the three sons each consolidated their individual interests into one of the businesses and released their interests in the others (Tr. 273).

On May 25, 1945, Ashton Bros. Company at Vernal was dissolved and on January 14, 1946, Ashton Bros, Inc., was formed. Rae Ashton and his immediate family, except for nominal qualifying shares, holds all of the stock in Ashton Bros., Inc.

Clarence Ashton and his immediate family, except for nominal qualifying shares, holds all of the stock in the Leslie Ashton & Sons Company at Roosevelt.

On November 7, 1945, Ashton's, Inc., of Heber City, the applicant, was formed and Lowe Ashton and his immediate family, except for qualifying shares, became the owner of all of the stock of this company. For approximately two years prior to the incorporation, Lowe Ashton and his wife operated the Heber business as partners, the partnership of the brothers having ceased (Tr. 274).

The stock of Ashton Oil & Gas Company at Vernal is held equally by the three brothers, (Tr. 270).

The partnerships, which operated the store at Heber City prior to incorporation, and Ashton's, Inc., since incorporation in 1945, transported and continues to transport most of the goods and merchandise needed by itself, as well as for the corporation at Vernal and the corporation at Roosevelt. The same partnership known as Ashton's received contract carrier permit No. 206 in 1938 from the Public Service Commission of Utah to

transport gas and oil for Shell Oil Company to Ashton Oil & Gas Company at Vernal, Utah (Tr. 175).

The plaintiff Uintah Freight Lines, a Utah corporation, is a common carrier of property between Salt Lake City, Heber City, and all points within the Uintah Basin. The plaintiff Eastern Utah Transportation Company is a common motor carrier of property authorized to transport between Price, Utah, and all points within the Uintah Basin.

Other carriers protested the application and particularly as it embraced a contract to haul petroleum products in bulk (Tr. 5). These carriers, Lang Transportation Corporation, Cantlay & Tanzola, Clark Tanklines, and Collett Tank Lines, withdrew from the hearing upon amendment of the application to eliminate petroleum products in bulk (Tr. 178-182).

Appearances were made for Ashworth Transfer Company, a partnership, and Salt Lake Transfer Company, a partnership, after the hearing had been under way for some time (Tr. 379). These carriers joined in the protest insofar as it involved transportation of cement from Devil's Slide, Utah, to Heber City, Roosevelt, and Vernal, Utah, and it was stipulated that these two carriers are common carriers with operating authority and adequate equipment at all times to transport required commodities, including cement, between Devil's Slide and Heber City, Roosevelt, and Vernal, Utah (Tr. 879-880).

The Report and Order of the Commission summar-

izes the issues and facts as these were considered and found by it (Tr. 101-110), and the position of plaintiffs can best be pointed out by reference to the report and order.

The Commission's Report states "that no carrier service was available during all the period of the early growth and development of these enterprises" (Tr. 104), which must be read in conjunction with the testimony that Sterling Transportation Company, the predecessor of Uintah Freight Lines, obtained its certificate October 2, 1926 (Tr. 67).

The case for the defendants was stated generally by the Commission in its Report, as follows:

"That applicant proposes to perform said contract motor carrier service in substantially the same manner and to the same extent, and for the same interested parties located in Roosevelt and Vernal, as said service has been performed, and is now being performed, by applicant and other members of the Ashton family, as individuals, or as partnerships or corporations wholly owned by members of said family, during the past fifty years. That even now, despite the various corporate interests, these Ashton mercantile stores are operated more or less as one large enterprise—purchase jointly, advertise jointly, and ship by railroad and motor vehicle jointly.

"That there is no evidence of willful intent to violate the law during the many years that Leslie Ashton, deceased, or one or more of his said three sons, as individuals, or as partnerships, or as

corporations, have transported merchandise from Salt Lake City to Heber City, Roosevelt and Vernal, Utah, serving the Ashton Mercantile Stores and gasoline service station, located in said cities, and the commission has treated the operations as private hauls." (Tr. 105).

The Commission also found "that existing transportation facilities do not provide adequate or reasonable service to meet the requirements of the three shippers for which applicant proposes to serve as a contract carrier" (Tr. 108), which finding was presumably supported by three specific findings of the respects in which existing transportation was considered to be neither reasonable nor adequate.

"That applicant, in the conduct of its general hardware store and lumber yard at Heber City, maintains a warehouse, and keeps on hand therein quantities of hardware and cement, lumber and other building materials, sufficient to meet its own needs, and the emergency demands made by customers upon said three shippers, located at Roosevelt and Vernal; that said emergency demands frequently arise and are phoned into applicant by said shippers, and that applicant is able to and does transport to said Roosevelt and Vernal, within a matter of three to four hours, the merchandise necessary to meet said emergency demands.

"That said two Ashton mercantile shippers, located at Roosevelt and Vernal, sell large quantities of fresh meats, fruits and vegetables, which

are highly perishable; that applicant, in the transportation of said commodities from Salt Lake to Roosevelt and Vernal, has made, and is now making, three trips weekly, leaving Salt Lake City in mid afternoon, and arriving in Heber City in the early evening, and in Roosevelt and Vernal at approximately 8 and 9 o'clock P.M., respectively, on the same day; that upon arriving at destination, applicant unloads said merchandise and places the same after business hours, in refrigerators and coolers located in the stores of said two Ashton mercantile shippers, and that by such means said merchandise is adequately preserved and can be made ready for display and sale at the time of the opening of the stores on the following morning. This practice has continued for a long period, and the business methods of the parties have been built upon this system.

“That said three shippers have emergency rush calls, arising particularly from the oil drilling, and the building construction incident thereto, in the Roosevelt and Vernal areas, for cement in truck load quantities; that said commodity is highly competitive and is available at Devil's Slide, Utah, at a slightly lower price than in the Salt Lake City market; that protestant, Uintah Freight Lines, does not operate between Devil's Slide and the Uintah Basin, and that none of the other protestants has offered to perform said transportation service between Devil's Slide and the Uintah Basin or do they have equipment stationed at any point along the route, or has stated

that it was able to perform the kind of service required by said three shippers.” (Tr. 106-107).

Specific portions of the evidence will be detailed in the argument of the several points relied on by plaintiffs as constituting error by the Commission.

POINTS RELIED ON AS ERROR

- I. All the evidence establishes the adequacy and reasonableness of existing service.
- II. The finding that Ashton's, Inc., did not willfully transport commodities without authority cannot be supported.
- III. The Commission erroneously held that only willful violations preclude the granting of certificates.

ARGUMENT

I.

ALL THE EVIDENCE ESTABLISHES THE ADEQUACY AND REASONABLENESS OF EXISTING SERVICE.

As already pointed out, the Commission's Report includes three statements of respects in which existing service is not reasonable or adequate to supply the needs of the three corporate shippers in this case, namely, Ashton Oil & Gas Company, a corporation of Vernal, Utah; Ashton Bros., Inc., a corporation of Vernal, Utah; and

Leslie Ashton & Sons Company, a corporation of Roosevelt, Utah. The three paragraphs of the report are quoted, *supra*, at pages six and seven and are found in the transcript at pages 106 and 107. These three paragraphs may be summarized as follows:

(a) The shippers have emergency demands arise frequently for transportation of hardware, cement, lumber, and other building materials from applicant's yard at Heber City to Roosevelt and Vernal;

(b) Ashton Bros., Inc., and Leslie Ashton & Sons Company require the particular service of the applicant to transport fresh meats, fruits, and vegetables;

(c) The three shippers have emergency calls for cement in truck-load quantities from Devil's Slide, Utah.

These subheadings will be separately considered.

(a)

The Shippers have emergency demands arise frequently for transportation of hardware, cement, lumber, and other building materials from applicant's yard at Heber City to Roosevelt and Vernal.

It appears from the testimony that this transportation is not actually carried for hire and that no authority is needed from the Public Service Commission for Ash-

ton's, Inc., to make this haul. These transactions are sales by the applicant and can be hauled to the place of delivery in connection with the sale. Consideration of these transactions was confusing to the Commission and should never have been considered as supporting the application for a permit.

Section 76-5-13, U.C.A., 1943, defines a contract carrier, and unless there be transportation "of property for hire" which is "the property of others," there is no problem presented for the Commission.

Mr. Lowe Ashton, President of the applicant, which is also the general merchandise store at Heber, testified as to the demand of oil wells for special commodities requiring extra long equipment for transportation (Tr. 215-216), and further testified that his corporation carries a "large jobbing stock in Heber" to enable it to make prompt and quick shipments when demand is made, and he testified that he maintains a "supply of building material on hand" for that very purpose (Tr. 217). And on cross-examination the same witness testified that lime and drilling mud are consigned to Ashton's, Inc. at Heber in carload lots "and we re-sell it" (Tr. 309).

Rae Ashton testified for Ashton Brothers, Inc. at Vernal that he has lots of rush orders which he fills by phoning to Heber, where Ashton's, Inc., picks up the merchandise and brings it to him in Vernal to satisfy the demand of his customers. And he testified that if he calls Lowe Ashton by noon he gets the material that night and that that is better service than Uintah Freight Lines could give him (Tr. 410). This witness testified to similar rush orders in the building business and that he calls Ashton's, Inc., to see if they have the item and, if they have,

to bring them out and, if not, he goes to Morrison-Merrill at Salt Lake City (Tr. 433). The same Mr. Ashton testified that occasionally his customers would not be satisfied to have their rush order filled on the day following their placement (Tr. 449-450). And the same Mr. Ashton, when testifying as to the nature of the services of Ashton's, Inc., at Heber City, testified that Lowe Ashton operates "more or less as a wholesaler" on the sales which he stocks at Heber City and which "we buy from him" (Tr. 465).

While Mr. C. L. Ashton was testifying, counsel in this case argued this very issue and counsel for the plaintiffs were arguing, "If Ashton's, Inc., as the witness is testifying, is a distributor of merchandise and is distributing its own merchandise that it buys and pays for, there is no need of this application. He would be carrying his own goods over the highway" (Tr. 629). And immediately thereafter that witness testified that in the event of loss in transit he would expect Ashton's, Inc., to pay for the material because it wouldn't be his (C. L. Ashton's) material yet.

It therefore appears to be plain that the emergency calls to Heber City are actually for materials stocked by Ashton's, Inc., and held for sale and actually sold in conjunction with the delivery. This was the understanding of the parties as to these transactions. They apparently did not understand that such a transaction does not require Commission authority. And if occasionally title is made to pass prior to the transportation, surely the

expedience of changing the passage of title is not such as to require issuance of a disputed and protested contract carrier's permit.

But if it be assumed that these transactions require common carrier or contract carrier service, then the record is plain that the plaintiffs could handle these deliveries with a maximum delay of two hours and in many cases with less delay than that, which according to the Ashtons themselves would be good and satisfactory service.

In behalf of the plaintiff Uintah Freight Lines it was testified that a delay of two hours in getting equipment from Salt Lake to Heber would be the maximum (Tr. 789). Mr. Lilenquist further testified that equipment was always available for this purpose (Tr. 723, 737-741, 789). And Rae Ashton testified that Ashton's, Inc., would load a common carrier as late as 4:00 o'clock in the afternoon (Tr. 435), which would enable Uintah to get the material to Roosevelt or Vernal by the opening of business the following day.

And although the Ashtons testified that this material could be delivered on call, it must be remembered that the applicant in this case has only four trucks available for all its over-the-road transportation service (Tr. 39), and since Ashton's, Inc., runs a regular service from Salt Lake to Vernal, as well as having all of the trucks in Vernal on some days (Tr. 426), it follows that on some occasions Ashton's, Inc., would have no truck available without a longer delay than the two hours it would take

Uintah Freight Lines to dispatch a truck from Salt Lake. As stated by one of the Commissioners in this hearing:

“It is not sufficient merely for the shipper to say it doesn’t meet his needs, without giving the particulars and the degrees to which it fails to meet his needs.” (Tr. 788).

Actually, the two-hour delay incident to getting a truck from Salt Lake to Heber would give better service than is required and certainly would be reasonable and adequate service under the testimony of the Ashton witnesses. Lowe Ashton testified that pick-up of an item or truckload at Heber by 3:00 o’clock in the afternoon and delivery in Roosevelt and Vernal by 8:00 o’clock the next morning would be “good service any place” (Tr. 305). And Lowe Ashton further testified that 99 percent of the emergency calls come between 8:00 and 8:30 in the morning (Tr. 329), which would enable Uintah Freight Lines to make the delivery that day, if required, or by early the following morning on their regular schedule, if that would suffice. Rae Ashton testified that next-morning delivery on rush orders would be satisfactory (Tr. 433-434) and that delivery within 12 hours would be satisfactory and would be “real good service” (Tr. 437-438). And C. L. Ashton also testified that delivery on the day following order would be satisfactory and would be “good service” on cement, lumber, refrigerators, hardware supplies, dry goods, groceries, and other staples (Tr. 620-621).

Rae Ashton testified that on small shipments, even though emergency shipments, when their truck is out of position to make the delivery on the day of order, they simply advise their customers they will have to wait "one more day" (Tr. 440-441) and on lumber items Rae Ashton testified that the customers want them "today or tomorrow" (Tr. 515). This would give Uintah Freight Lines more than sufficient time to meet the requirements, either by putting the shipments on their regular schedules, by dispatching special equipment, or by reversing regular equipment returning from the Uintah Basin in response to emergency orders.

There is no substantial testimony of need for certificated service from Heber to Roosevelt and Vernal on these emergency items stocked at Heber by Ashton's, Inc., both because actually the transactions are sales and not shipments for hire and, also, because no demand for service has been shown which is not reasonably and adequately supplied by the common carrier service already existing. It appears that the Commission took the view that since Ashtons has always had a family interest in the business in this proceedings the permit should issue and permit them to serve each other in the way that they previously served themselves. This does not meet the statutory test.

(b)

Ashton Bros., Inc., and Leslie Ashton & Sons Com-

pany require the particular service of the applicant to transport fresh meats, fruits, and vegetables.

The Commission's report finds that the two shippers located at Roosevelt and Vernal sell large quantities of fresh meats, fruits, and vegetables and that applicant makes three trips weekly upon which this merchandise is carried, which is unloaded into refrigerators and coolers in the evening of the day of shipment and made ready for display and sale the next morning, and that the business methods of these shippers have been built upon this system (Tr. 107).

This was substantially the testimony of the Ashtons. The trucks leave Salt Lake City at 1:00 o'clock, p.m., and arrive in Roosevelt at 8:00 o'clock and at Vernal at 9:00, 10:00, or 11:00 (Tr. 22, 584, 402, 406). This merchandise is transported in an open truck (Tr. 603) without refrigeration (Tr. 330, 602, 609) and is unloaded upon arrival after the stores have closed by the night watchman and the drivers (Tr. 323, 403, 406, 423, 458, 584, 644).

But it should be noted that Ashton Bros., Inc., at Vernal buys most of its meat locally and has only occasional shipments from Salt Lake City (Tr. 400). Leslie Ashton & Sons Company at Roosevelt also buys some of its meat locally (Tr. 583) and ships not less than half a carcass of beef and sometimes a full carcass each week via Ashton's, Inc., from Cudahy at Salt Lake (Tr. 620, 583).

Leslie Ashton & Sons Company at Roosevelt pur-

chases its fruits and vegetables from peddlers and very seldom receives shipments of fruits and vegetables via Ashton's, Inc. (Tr. 607). C. L. Ashton testified on April 26, 1949, that his company had not received any fruits or vegetables via Ashton's, Inc., during the year 1949 to that date (Tr. 644).

The shipment, then, is fruit and vegetables for Vernal and meat for Roosevelt.

It appears, then, that the Ashton truck leaves Salt Lake in the hottest part of the day and travels during the entire afternoon, reaching Roosevelt and Vernal in the evening and before midnight.

Uintah Freight Lines, on the other hand, runs at a cooler time of the day, namely, from 7:00 in the evening until 3:00, 4:00, or 6:00 or 7:00 in the morning (Tr. 228-230, 424, 604,, 741, 743, 724). Uintah also operates with closed vans (Tr. 603), and in the summer time uses dry ice for fruits, vegetables, and meat (Tr. 741).

It thus appears that the night watchman of the Ashton shippers could receive fruits and vegetables from Uintah Freight Lines in the early morning if they were willing to (Tr. 234, 347, 835), although the Ashtons were very reluctant to admit that the problem could be solved in this manner. For instance, Lowe Ashton testified, "We can work after hours to do it for ourselves," (Tr. 305), and Rae Ashton testified, when he was asked if his night man could accept deliveries from Uintah Freight Lines, "Well, I don't know if we would extend that privilege" (Tr. 424). The president of Uintah

Freight Lines also testified that the plaintiff would be willing to put on an extra service if the business of the Ashtons could be given to his company and if the freight justified the service (Tr. 789).

Uintah Freight Lines could therefore furnish a daily service on a cooler run in equipment better adapted to the carriage of meats, fruits, and vegetables and could likewise deliver to a night man at the stores in Roosevelt and Vernal. Again, we quote from Commissioner Hacking:

“It is not sufficient merely for the shipper to say it doesn’t meet his needs, without giving the particulars and the degrees to which it fails to meet his needs.” (Tr. 788)

The defendant and its witnesses have shown no particulars in which the service of Uintah Freight Lines is not or would not be reasonable and adequate for the small shipments of meats, fruits, and vegetables involved in this application, which could be daily instead of every other day.

(c)

The three shippers have emergency calls for cement in truck-load quantities from Devil’s Slide, Utah.

The transportation of cement from Devil’s Slide to Heber, Roosevelt, and Vernal is the most important item involved in the hearing. In 19~~48~~8 cement constituted

50 per cent of the total tonnage hauled by the defendant (Tr. 299). Lowe Ashton testified again that lumber and cement combined would constitute between 50 and 60 per cent of the total freight (Tr. 324), and C. L. Ashton testified that his sales of cement ran as high as 700 bags within 24 hours (Tr. 589). The closely competitive market on cement was testified to by J. V. McLea (Tr. 353), who stated the minimum price at \$3.30 a barrel on a minimum shipment of 528 bags, with a 28-cent freight rate, or else go to Salt Lake and pay 37 cents a barrel more.

But, despite this, no request was ever made upon Uintah Freight Lines to transport cement (Tr. 425) and the Ashtons did not even know that Salt Lake Transfer Company and Ashworth Transfer Company had authority to haul cement from Devil's Slide to the three points in question (Tr. 416, 589), although it was stipulated that these two concerns have authority and available equipment (Tr. 880).

There was a complete absence of any showing that available service was not reasonable or adequate. On this question C. L. Ashton was asked whether he knew of any service except Ashton's, Inc., which could bring cement from Devil's Slide, and he testified, "Not that I have any information on. That is, no one has ever solicited hauling it from Devil's Slide." And the same witness testified that if cement could be ordered one day and delivered to him the next day that would be satisfactory service (Tr. 620).

And it appeared in the evidence that Uintah was making the haul on cement for another outlet when the Ashtons took the business away and hauled it via Ashton's, Inc. (Tr. 814).

The burden of proof is on the applicant to show that there is no reasonable or adequate service to meet his needs before it is entitled to a certificate under Section 76-5-21, U.C.A., 1943. Existing facilities have not been shown to be such and plaintiffs, on the other hand, have shown that there are two certificated carriers well able to make this haul and that the defendants and the other Ashton corporation have never used their service.

The plaintiffs are common carriers operating under the rules and regulations of the Public Service Commission and have shown in this record that their service to the Uintah Basin has been constantly improved since the present owners took over Sterling Transportation Company and have shown an ability and willingness to meet all the reasonable requirements of the shippers who testified for the defendant. The defendant made no showing that existing facilities were neither reasonable nor adequate and the Commission's report and order must be held unsupported by substantial evidence.

II.

THE FINDING THAT ASHTON'S, INC., DID NOT WILLFULLY TRANSPORT COMMODITIES WITHOUT AUTHORITY CANNOT BE SUPPORTED.

The report of the Commission rather gives the im-

pression that the transportation service of Ashtons at Heber City was lawful until Ashton's, Inc., was formed in 1946. There is no basis for this impression, as it is plain that for twenty years or so the businesses in the three towns have been separate and the fact that they were owned as stockholders or partners by the same three persons would not identify their interests and obviate the obtaining of certificates from the Public Service Commission. The record at pages 133, 159, 163, 272, and 582 makes plain the separate existence of the three business entities for a long period of time.

On December 9, 1938, the Public Service Commission issued a contract carrier's permit to Ashtons at Heber City for the transportation of petroleum products (Tr. 175), and it certainly cannot be contended that Lowe Ashton, the president of the applicant, was ignorant of the requirements of the law from that date forward. The witnesses McLea and Fitzgerald were well aware of what constituted unlawful operation (Tr. 369, 393), and it is only reasonable to assume that the Ashtons were equally aware of what was going on.

Rae Ashton was asked on cross-examination, "And you believe in regulation under law?" to which he answered, "Yes, sir." He was then asked, "Don't you know that the services that you have been asking Ashton's, Inc., to perform have been unlawful?" And he again answered, "Yes, sir." He was then asked, "And why have you persisted in requesting those services?" And he answered, "Well, we had always had that serv-

ice and we have just kept on using it'' (Tr. 444). C. L. Ashton testified on cross-examination with reference to Ashton's, Inc.:

“I am going to support it as long as the law will permit me, because it is better service than has ever been offered, or that I think other people will offer.” (Tr. ~~468~~ 615,

It was admitted at the hearing that the applicant had been hauling in violation of the motor carriers laws, its counsel stating at pages 193-194:

“Now, there has been some irregularity and we are frank to admit that. These partners were hauling merchandise for a corporation in which they were equal owners with Clair Ashton, and there is a technical violation there, and we are frank to admit that.

“But, in the main they were hauling for themselves as partners, who were operating then two or three units.”

And at the time the present corporation was formed the transportation was left entirely to the applicant and it was specifically agreed that the entire operation was Ashton's, Inc., without any sharing of responsibility or profits or losses (Tr. 337).

There is not one word of testimony in this very lengthy record which says that any one of the three Ashton brothers was ignorant of the requirements of the

law and that he believed that their operation complied with the law and that a certificate was unnecessary because of the family relationship. Despite the finding of the Commission, it appears that the violation in this case was willful.

III.

THE COMMISSION ERRONEOUSLY HELD THAT ONLY WILLFUL VIOLATIONS PRECLUDE THE GRANTING OF CERTIFICATES.

Whether the violation was willful or unintentional is not as important as the error involved in the Commission's assumption that only a willful violation was a deterrent to granting the certificate requested. Since the Commission misconceived the applicable law, there was necessarily error in its consideration of this case and this Court should set aside the order of the Commission and instruct it to proceed upon sound principles—if the Court shall find that plaintiffs are wrong in their contention that defendant failed to show that existing facilities are neither reasonable nor adequate.

The Commission's own decisions show that in the past the disqualification to an applicant based upon unlawful operation has not been confined to willful violations.

In *Denver & Rio Grande Western Railroad Company v. Linck*, 56 F. 2d 957, the Court was considering an injunction against a carrier operating in violation of

the law and referred to the ruling of the commission in this way:

“During December, 1927, three of the defendants, W. H. Linck, Jr., Walter H. Schoenfeld, and Clarence Pehrson, applied to the Public Utilities Commission of Utah for a certificate of convenience and necessity to operate a motor truck freight line from Salt Lake City to various points in the Marysvale territory. This application was denied for the reason that the applicants had been operating a truck line in violation of the provisions of the law.”

In that same case, which was No. 1000 before the Public Utilities Commission of Utah, the Commission's Report was dated December 26, 1928, and concluded:

“The Commission finds, after careful consideration, all of the evidence shows that applicants have been operating for hire, transporting freight and express for numerous persons, firms, and corporations and appear to be in violation of Chapter 42, Session Laws of Utah, 1927, and that such operators who violate the provision of the State Law should not be rewarded with certificates of convenience and necessity. The application should, therefore, be dismissed with prejudice. An appropriate order will be issued.”

In the matter of the application of M. C. West and R. A. Nielsen, and in the matter of the application of R. A. Nielsen, M. C. West, and Jack Miller, Public

Utilities Commission of Utah, Cases No. 975 and 985 (June 13, 1928), 11 Utah P.U.C.R. 27, it was stated:

“The Commission finds after careful consideration of all the evidence, that applicants have been operating for hire, transporting freight and express for numerous firms, persons, and corporations, and that applicants have failed to comply with the provisions of Chapter 117, Session Laws of Utah, 1925, and also appear to be in violation of Chapter 42, Session Laws of Utah, 1927; and that such operators who violate the provisions of the State laws, should not be rewarded with certificates of convenience and necessity. The applications should therefore be dismissed with prejudice.”

In the matter of the application of J. L. Coons, Public Utilities Commission of Utah, Case No. 1352 (August 16, 1933), 16 Utah P.U.C.R. 205, the Commission said:

“That the application of J. L. Coons for a permit to operate as a contract motor carrier between Salt Lake City and Kanosh, Utah, and certain intermediate points should be denied for the following reasons:

“That applicant has for the past four years operated in violation of Chapter 42, Session Laws of Utah, 1929, in that he failed to procure a permit before commencing operations for more than one person, firm, or corporation; that he has failed to comply with the provisions of Chap-

ter 117, Session Laws of Utah, 1925, in that he has not filed reports covering his operations for hire over the highways and paid the taxes thereon.”

In the application of Don H. Anderson, Public Service Commission of Utah, Case No. 2150 (October 21, 1938), the Commission issued its report which, in part, is as follows:

“The applicant testified that he would abide by the laws of the State of Utah and of the rules and regulations of the Public Service Commission of Utah as they applied to the performance of operations such as those proposed by the applicant. However, he testified further that he had for some time in the past been hauling for this company without authority from the Commission, and that he was arrested and fined for such violation in 1937. He testified further that he was again apprehended by inspectors of the Public Service Commission on August 3, 1938, but that he had not operated in violation of the law since August 3, 1938, and that only on a few occasions thereto had he performed unauthorized hauls.

“It is somewhat doubtful if there is any particular need for the service. It also appears from the evidence that the applicant has persisted knowingly on numerous occasions both before and since August 3, 1938, in transporting commodities for hire in violations of the laws of this State and of the rules and regulations of this Commission. The Commission believes that

it cannot and be consistent with the motor vehicle act grant authority to a person under such conditions, even though the need of the service proposed and the other determining factors were favorable to the granting of the application. The Commission, therefore, concludes that the application should be denied.”

A similar attitude is shown by the decision of the Public Service Commission of New York in the case of *in re Unauthorized Bus Operations* (1941), 40 P.U.R. (NS) 40, where it is held:

“What was incidental and perhaps accidental has developed into practice, and the Commission has decided that hereafter no authority will be granted to an operator guilty of illegal operation at the time, that all illegal operation must cease and that every applicant must come before the Commission with clean hands and secure full legal authority to operate before proceeding.

“This general statement applies to all classes of illegal operation. In other words, operation over a new route or any highway, street or public place for which full authority has not been granted, will not be allowed.”

The Supreme Court of Arkansas in *Motor Truck Transfer, Inc., v. Southwestern Transportation Company*, decided December 1938 in 122 S.W. 2d 471, had this to say (at page 473):

“Without attempting to be too critical of the

conduct of others, it appears to us that the only arbitrary action that has been taken in this whole controversy arises out of the conduct of Mr. Garms and his corporation in their refusal to be bound by the regulatory provisions of the commission. The right to make rules and regulations necessarily implies a power that may be exercised for their enforcement.

“It is argued here that the appellant company has made rather heavy investments to perform the particular service which it has heretofore been licensed to do; that the action of the commission in refusing to issue a new, and what we presume is desired, general license is not only arbitrary, but it is the taking of property, or what amounts to the same thing, a destruction of appellant’s property to refuse to permit it to go on. We do not think so. Most probably had the appellant company been obedient to the rules and regulations made for the benefit of the public and for its own protection, it might yet have been operating. If its property has been sacrificed, it has been the victim of its own conduct.

“The judgment of the lower court affirming the order of the commission is sustained.”

And this Court in *Rowley v. Public Service Commission*, 112 Utah 116, 185 P. 2d 514, has laid down no such requirement. In that case the applicant for a permit to operate as a contract motor carrier had been operating in violation of the laws and regulations for a number of years and he sought to obtain the permit on the basis

that he was in operation on January 1, 1940, as indicated by Chapter 105, Laws of Utah, 1945, which amended Section 76-5-21, U.C.A., 1943. The Court found the applicant's contention ridiculous, as he wanted to have the same privileges for an illegal operation that others had for a legal operation. The Court said:

“It would be the height of inconsistency to ascribe to a legislative body an intent to include in the definition of ‘persons engaged in business’ carriers who would be expressly prohibited by the same legislative body from engaging in the particular business.” (Page 125)

The Court held that a violator was not a favored but a penalized person under the laws, and said at page 126:

“It seems more consistent with legislative intent to prefer the citizen who was legally operating his business, and to discourage the one who violated the law.”

Had the Rowley case been decided the other way, Ashton's, Inc., would have been in a position to assert a right to a permit based upon operations on January 1, 1940. Ashtons are trying to get the same result through a roundabout approach which circumvents both the Rowley decision and the intent of the legislature to penalize violators. Ashtons show their earlier experience in the transportation field and their continued experience up to the present time as proof of their need for a serv-

ice. This need for a service has been based upon an unlawful operation and should have been recognized as such by the Commission. The Court should be consistent with its approach in the Rowley case and disqualify Ashton's, Inc., because of its violations. Any testimony of need for service should come from a source not *particeps criminis* in the violations.

It is true that in some cases violations have been found to be willful and therefore a particularly disqualifying factor, but the general attitude has been that a carrier who has operated unlawfully will not be considered favorably in an application to legalize the operation in the absence of very pressing need. In re Cotelli (California P.S.C. 1941), 39 P.U.R. (NS) 308; Ex Parte William M. Decker (Louisiana P.S.C. 1947), 68 P.U.R. 403; In re Asbury Truck Co. (California P.S.C. 1933), Decision No. 26279, Application No. 18634.

In the Decker case the Louisiana commission, after referring to the violations and stating a rule that the existence of violations does not compel denial of the application, stated:

“Where such violations have been trivial, or arose through obvious ignorance of the violated statute or rule or where the public need for the service offered is so considerable that the commission feels justified in providing that service, even through an admitted violator, the certificate should be granted.”

And then, after stating that the violation had been long continued, the commission denied the application because there had been shown "no such considerable public need for the service" as would justify overlooking the violations in the public interest.

In this case plaintiffs believe there is no showing that existing facilities are inadequate or unreasonable and, certainly, the facts here present a borderline case. Under a correct understanding and application of the law, the Commission acted arbitrarily in granting the certificate applied for in the face of the wrongful operations of the applicant and the very weak case made on adequacy and reasonableness.

SUMMARY AND CONCLUSION

The Report and Order of the Commission eliminates most of the issues upon which testimony was offered and over which counsel argued during the hearing. This Report attempts to justify the order granting the application by finding that the service was neither reasonable nor adequate because of three situations:

(a) The shippers at Roosevelt and Vernal have emergency demands for hardware, cement, and lumber which are shipped from applicant's yard at Heber City.

(b) The shippers at Roosevelt and Vernal need applicant's service for fresh meats, fruits, and vegetables.

(c) There are emergency calls for cement in truck-load quantities from Devil's Slide, which is outside the territory of Uintah Freight Lines.

Plaintiffs submit that none of these findings of ultimate fact is supported by substantial evidence. The shipments from Heber City are a fiction since in fact these are sales and the applicant is simply making delivery pursuant to sales. On the meats, fruits, and vegetables, trifles were pressed to the limit at the hearing. The Vernal shipper ships no substantial meat, and the Roosevelt shipper ships no fruits and vegetables. For them to argue that they require three weekly shipments during the heat of the day in an open truck without refrigeration as against plaintiffs' offer to furnish daily shipments in the cool of the night in closed trucks with refrigeration when needed and that this shows a need for service which cannot be adequately and reasonably met by the plaintiffs is absurd. And on the shipments from Devil's Slide there is not one word of testimony that the applicant or the Ashton shippers at Roosevelt and Vernal have ever even tried any other carrier, and the evidence is that both Salt Lake Transfer and Ashworth Transfer have authority and plenty of available equipment to make this haul. And there is not a scintilla of evidence that Salt Lake Transfer and Ashworth Transfer cannot and will not render reasonable, adequate, and efficient service.

Then the Commission finds that there is no evidence of willful violation and, accordingly, the application is

granted. The evidence is that the Ashtons knew they were operating in violation and they apparently justified it in their own minds because their several corporations and partnerships had common ownership. This purported justification does not affect the willfulness. But the more prejudicial error of the Commission lies in assuming that a violation must be willful before it can disqualify an applicant, which rule is not supported by the authorities and is contrary to reason. Regulations of carriers favor the vigilant and the efficient, and a qualification for increasing permits or certificates is a showing of ability and willingness to abide by the regulations. The Commission in this case has misconceived the rule.

And if the Court disagrees with everything in our argument up to this point, then the order of the Commission should still be set aside. If it be assumed that some showing was made that existing service is neither reasonable nor adequate and that the violations of the applicant do not disqualify it, then it still appears patently from the record in this case that the showing of applicant was very questionable on reasonableness and adequacy, and such showing is not sufficient to overcome the admitted practice by the applicant of hauling without permits.

Respectfully submitted,

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Attorneys for Plaintiffs